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No. 91-576

**In the Supreme Court of the United States**

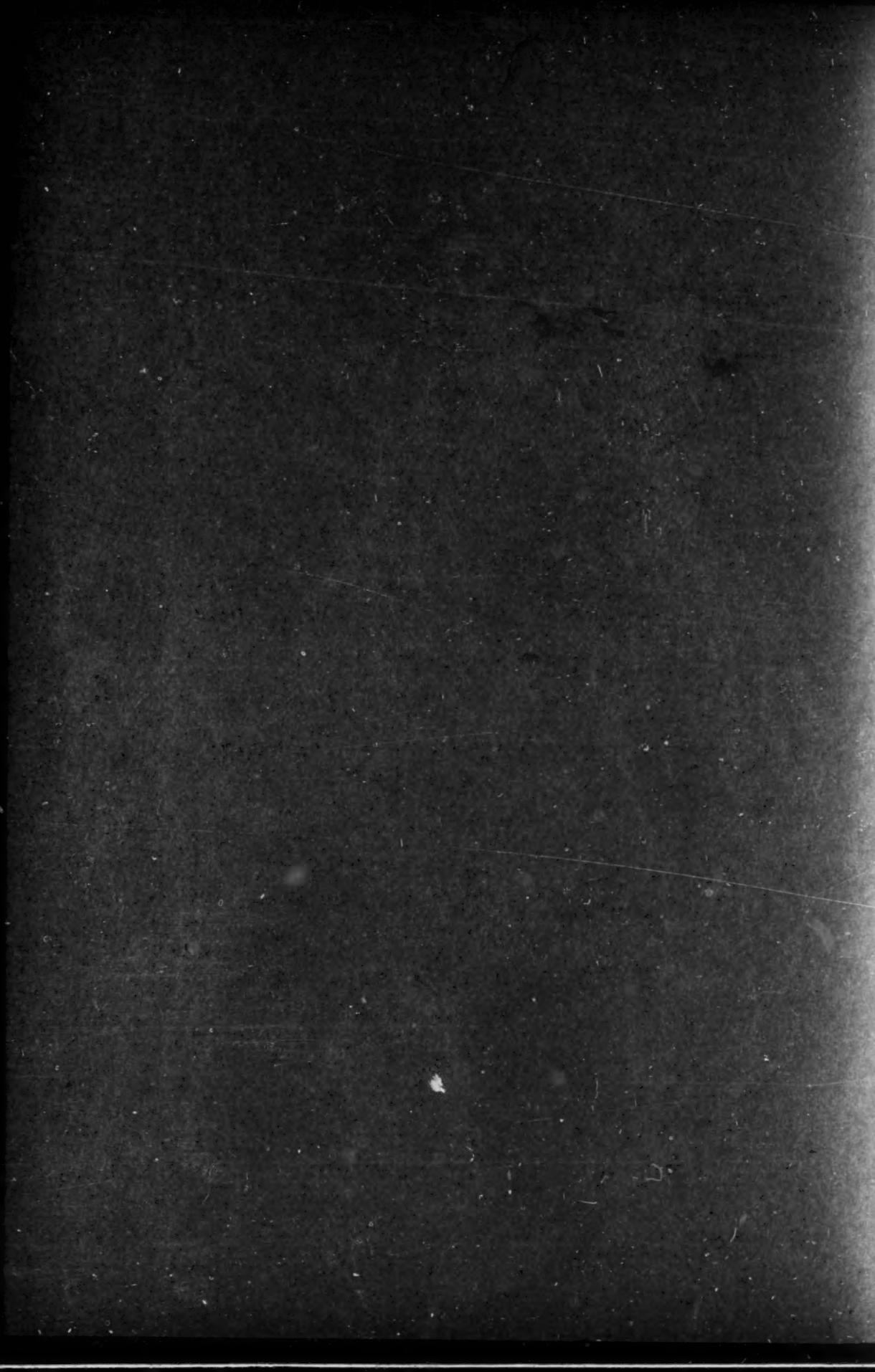
OCTOBER TERM, 1991

ELLEN SCHNEIDER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**BRIEF FOR RESPONDENTS IN OPPOSITION**KENNETH W. STARR  
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### **QUESTION PRESENTED**

Whether petitioners' claims under the Federal Tort Claims Act are barred by the exception for claims arising out of misrepresentation.



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BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 101-114, is reported at 936 F.2d 956. The opinion of the district court, Pet. App. 115-131, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1991. The petition for a writ of certiorari was filed on October 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title V of the Housing Act of 1949 (Act), 42 U.S.C. 1471 *et seq.*, authorizes the Secretary of Agriculture to provide financial and technical assistance

(1)

to low-income rural residents who are unable to obtain housing loans through conventional financing. To be eligible for federal funding, applicants must purchase housing that meets the Minimum Property Standards of the Department of Housing and Urban Development (HUD). 42 U.S.C. 1471(a), 1476(a); 7 C.F.R. Pt. 1822 *et seq.* Manufacturers of housing may qualify their products for the program by submitting to HUD the plans and specifications for each model of house to be constructed. HUD Handbook 4950.1, § 2-7, at 2-5. If HUD finds that the plans and specifications meet the Minimum Property Standards, a HUD regional office issues a Regional Letter of Acceptance stating that the model qualifies for federal financing. Without such a letter of acceptance, or its equivalent issued by the Farmers Home Administration (FmHA), buyers may not use federal financing to purchase homes from the manufacturer. Pet. App. 120.

In January 1971, a HUD Regional Letter of Acceptance was issued to Tri State Homes, Inc. (Tri State) based on plans, specifications, and descriptions of building materials submitted by Tri State to a HUD regional office. The letter, which was updated in 1975 and 1977, indicated that the Tri State models listed were acceptable and approved for federal financing and that the manufacturer's plans and specifications met HUD's Minimum Property Standards. During construction of Tri State's houses, HUD inspectors inspected the Tri State factory, but did not test Tri State's materials to determine whether they complied with HUD's Minimum Property Standards. Rather, the inspectors sought to determine only that Tri State's models conformed to the Letter of Acceptance. Once the houses were built, Tri State certified

to HUD that each house was built in compliance with the Regional Letter of Acceptance and with the Minimum Property Standards. Pet. App. 120-122.

2. Petitioners purchased houses manufactured by Tri State with HUD or FmHA financial assistance. The houses were built in compliance with the January 1971 Regional Letter of Acceptance. In seeking federal financing for the purchase of Tri State houses, petitioners submitted copies of dwelling specifications with their applications. The FmHA supervisors who reviewed petitioners' applications relied on the HUD Regional Letter of Acceptance and Tri State's certification that the houses complied with the Minimum Property Standards. Pet. App. 102-103, 122.

Tri State's houses were constructed with sheathing paper placed between the wood walls and the siding; the purpose of the paper is to reduce the flow of air. The sheathing paper required under Tri State's specifications, as approved in HUD's Regional Letter of Acceptance, was Thilco 30/30 building paper. The Thilco paper had a permeability rating of less than 1 perm, making it highly impermeable. The Minimum Property Standards in effect from 1970 to 1978 required qualifying houses to be constructed with sheathing paper with a permeability rating of at least 5 perms. Due to the inadequate permeability of the sheathing paper used by Tri State, moisture was trapped in the wall cavities of petitioners' houses causing the sheathing paper to rot. As a result, petitioners' homes were damaged and petitioners suffered personal injuries.<sup>1</sup> Pet. App. 103, 122-123.

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<sup>1</sup> The injuries alleged by petitioners include "[u]pper air-way disease characterized by symptoms to the nose, sinuses, ears, throat, and mouth" from "infections and allergies secondary to exposure to mites, molds and other antigens";

3. In response to those events, petitioners filed an action against respondents under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* The complaint alleged that HUD had negligently inspected and approved plans and specifications for the construction of factory-built houses by Tri State, in that HUD approved plans that included sheathing paper that did not meet the Minimum Property Standards. The complaint further alleged that the government's negligence caused harm to petitioners. Pet. App. 104.

The district court granted summary judgment in favor of the government, holding that petitioners' claims are barred by the exception to liability under the FTCA for "[a]ny claim arising out of \*\*\* misrepresentation." 28 U.S.C. 2680(h). Pet. App. 115-131. The court determined that misrepresentations by the government were "essential" to petitioner's claims because Tri State required a HUD Letter of Acceptance to sell houses that were eligible for federal financing, and petitioners were injured as a result of having "relied on misinformation in a government document when making their decision to purchase a home." *Id.* at 127. Although the misrepresentation that injured petitioners resulted from the government's underlying negligence in approving Tri State's houses, the court found that petitioners would not have been harmed "had the misinformation not been communicated through the Regional Letter of Acceptance." *Ibid.*

4. The court of appeals affirmed. Pet. App. 101-114. The court agreed that petitioners' FTCA claim

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"[l]ower airway disease characterized by hyper-reactive airways"; "[c]hronic mixed headaches secondary to sinus congestion and muscle tension"; and "Annoyance Irrit[ation] syndrome." Pet. App. 103 n.2.

is barred by the misrepresentation exception under the reasoning of *United States v. Neustadt*, 366 U.S. 696 (1961). The court noted that petitioners relied on information supplied by the government when deciding to purchase a house from Tri State and that they "have alleged no injury they would have suffered but for the communication of HUD's evaluation to Tri State and FmHA." Pet. App. 108. The court of appeals rejected petitioners' reliance on *Block v. Neal*, 460 U.S. 289 (1983), because unlike in that case, petitioners "have alleged no claim for negligent supervision of the construction of Tri State's houses." Pet. App. 110.

#### **ARGUMENT**

Petitioners contend (Pet. 9-17) that the court of appeals erred in holding that their claim is barred under the misrepresentation exception to the FTCA. They do not claim that the decision in this case conflicts with the decision of another court of appeals; they claim only that, properly understood, the complaint in this case arises out of the government's negligence "in causing homes" to be built that were unsafe, rather than the government's misrepresentation to Tri State that the homes met applicable Minimum Property Requirements. Pet. 11. The court of appeals correctly rejected that contention.

1. The FTCA waives the sovereign immunity of the United States to allow a claimant to recover "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission

occurred." 28 U.S.C. 1346(b). The FTCA excludes, however, liability for a variety of torts, including torts "arising out of \* \* \* misrepresentation." 28 U.S.C. 2680(h).

In *United States v. Neustadt*, 366 U.S. 696 (1961), the Court applied the misrepresentation exception in a factual setting that is analogous to this case. There, Neustadt sued under the FTCA alleging that the government had negligently inspected and appraised property for purposes of insuring a mortgage, and that he had justifiably relied on the integrity and accuracy of the appraisal in purchasing the property. Neustadt claimed that the government was liable to him, not for misrepresentation, but for its underlying negligence in conducting the appraisal. This Court rejected the argument that the misrepresentation exception "does not apply when the gist of the claim lies in *negligence* underlying the inaccurate representation," that is, "when the claim is phrased as one 'arising out of' negligence rather than 'misrepresentation.'" 366 U.S. at 703. When the plaintiff's claim depends on the receipt of inaccurate information from the government, due to the government's negligence in obtaining the information, the claim is barred by the misrepresentation exception. *Id.* at 706-708. That exception applied to Neustadt's claim because, as the Court later put it in *Block v. Neal*, 460 U.S. 289, 296 (1983), "Neustadt alleged no injury that he would have suffered independently of his reliance on the erroneous appraisal."

The same analysis applies in this case. As the court of appeals explained, petitioners "have alleged no injury they would have suffered *but for* the communication of HUD's evaluation to Tri State and FmHA." Pet. App. 108. When purchasing their

homes, petitioners relied on the government's Letter of Acceptance that certified that Tri State's houses met the Minimum Property Standards; petitioners were then injured by virtue of the fact that the government's certification was incorrect. Here, as in *Neustadt*, if the information that was communicated to petitioners had not been erroneous, petitioners would not have been harmed. As the Court made clear in *Neustadt*, petitioners cannot "circumvent" the misrepresentation exception by attacking the government's negligence in the underlying inspection, rather than the inaccurate statements on which they relied in purchasing their homes. 366 U.S. at 703-704 & n.13.

2. Petitioners contend (Pet. 16-17) that their claim actually rests on an independent act of negligent supervision, and that the misrepresentation exception is therefore inapplicable under *Block v. Neal*, 460 U.S. 289 (1983). In *Block*, the FmHA voluntarily undertook to supervise the construction of plaintiff's house. In the course of that supervision, the FmHA inspector negligently found that the construction of the plaintiff's house conformed to the drawings and specifications approved by the FmHA. In fact, the house was flawed by a series of defects in the construction that deviated from the plans approved by FmHA and from applicable Minimum Property Standards. The Court held that the government's voluntary undertaking to supervise construction gave rise to a duty under state law to "use due care to ensure that the builders adhere to previously approved plans and cure all defects before completing construction," a duty the Court found to be "distinct from any duty to use due care in communicating information to respondent." *Block*, 460 U.S. at 297.

The critical ingredient of the claim upheld in *Block* was the existence of "distinct" duties (1) to

use due care in supervising construction, and (2) to use due care in communicating information. Based on those different duties, the plaintiff could establish that she suffered damages from negligence in supervision that differed from the damages flowing from the negligent communication of information. 460 U.S. at 297-298. The Court held that a claim for negligent supervision in that setting was not barred by the misrepresentation exception. No such distinct duties, or damages, can be identified in this case.

Petitioners concede (Pet. 10, 12, 14, 15) that, throughout the construction and certification of petitioners' houses, FmHA and HUD inspectors did not determine, and were not required to determine, that the materials used by Tri State complied with the Minimum Property Standards.<sup>2</sup> Instead, the inspectors relied on the fact that the Regional Letter of Acceptance indicated that the listed models complied with the Minimum Property Standards. Therefore, the only negligent act alleged in this case is the original negligence occurring during HUD's approval of Tri State's designs. The injury that petitioners experienced resulted from the government's communication of its approval of Tri State's plans in the Regional Letter of Acceptance—and the misrepresentation contained in that letter that the plans complied with the Minimum Property Standards. The injury did not result from the government's subsequent inspection of the construction of the houses. *Block* is therefore of no assistance to petitioners.

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<sup>2</sup> Petitioners expressly state that the government's plant and site inspectors "were not expected to make independent judgments during construction stages regarding whether the plans and specifications complied with the Minimum Property Standards. Their sole responsibility was to insure that the plans be implemented as approved." Pet. 10.

Petitioners are not aided by their argument (Pet. 11-16) that Wisconsin law creates a duty to use reasonable care in the conduct of building inspections and in the review of plans and specifications. The exceptions to the government's liability under the FTCA limit the courts' jurisdiction to entertain a suit against the government, see *United States v. Sherwood*, 312 U.S. 584, 586 (1941), and the applicability of these exceptions is a question of federal law, not state law. *Neustadt*, 366 U.S. at 705-706; *Ramirez v. United States*, 567 F.2d 854, 856 (9th Cir. 1977). Because petitioners' claim, properly characterized, is barred by the misrepresentation exception, the government is not exposed to liability regardless of the law of the place where the act or omission occurred. *Neustadt*, 366 U.S. at 706 n.15. In any event, as the court of appeals noted, petitioners "have alleged no claim for negligent supervision of the construction of Tri State's houses." Pet. App. 110. In light of that omission, it is irrelevant what duties state law might have imposed on the government during the supervision phase of its activities.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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